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No. 05-1624

Supreme Court, U.S.
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In The
Supreme Court of the United States

B. BRAUN MEDICAL INC.,

Petitioner,

v.

BOBBY EUGENE ROGERS and
ROZI MEDICAL DEVICES LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state as follows:

Respondent Rozi Medical Devices Ltd. is an Ohio limited liability company with no parent or subsidiary. No publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Braun's petition is an effort to manufacture the appearance of a circuit conflict where there is none. Braun attempts to achieve this goal by citing numerous cases on discretionary remittitur orders, while scrupulously avoiding any mention of the fact that the district court in this case reduced the jury's award ***pursuant to a Rule 50(b) motion for judgment as a matter of law***. Appendix to Petition for Writ of Certiorari ("Cert. App.") at 27a-28a, 32a-33a, 45a. This crucial fact is omitted from Braun's petition because it is fatal to Braun's argument as to the appropriate appellate remedy. Likewise, Braun never bothers to mention the Court of Appeals' holding that the district court "erred as a matter of law" in depriving plaintiffs of their statutory right to "unjust enrichment" damages for the profits Braun made by willfully misappropriating their trade secrets. Cert. App. at 8a-9a. Finally, Braun's petition conveniently omits any reference to the fact that the Court of Appeals' opinion is an unpublished memorandum disposition that could not possibly create a circuit conflict.

Viewing the petition in its proper procedural context, Braun has failed to present any viable ground for a grant of certiorari. First, Braun's claim of a circuit conflict is contrived. Unlike this case, the line of cases cited by Braun do not involve an error of law committed by the district court in modifying a jury's verdict pursuant to a Rule 50(b) motion for judgment as a matter of law. There is no conflict between the circuits as to the appropriate appellate remedy in these circumstances: Where the district court has committed an error of law in eliminating a category of damages pursuant to Rule 50(b), the proper remedy is to reinstate the jury's award. *See Hall v. Consolidated Freightways*

Corp. of Delaware, 337 F.3d 669, 671, 680 (6th Cir. 2003); *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 569-570, 573 (7th Cir. 2003); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1178, 1204 (9th Cir. 2002); *Blackmon v. Pinkerton Sec. & Investigative Services*, 182 F.3d 629, 630 (8th Cir. 1999); *Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers*, 34 F.3d 1148, 1158, 1161 (2d Cir. 1994).

Second, Braun's entire petition is premised on the false notion that the Court of Appeals' disposition requires reinstatement of an excessive damages award. It does not. The Court of Appeals found that the district court "erred as a matter of law" in eliminating the award of damages for Braun's unjust enrichment. Cert. App. at 8a-9a. Obviously, the Ninth Circuit concluded that the jury's unjust enrichment award was ***not*** excessive as a matter of law. The California Uniform Trade Secret Act ("CUTSA") expressly authorizes recovery of the wrongdoer's "unjust enrichment," Cal. Civ. Code § 3426.3, and the jury's original award fits comfortably within the range of evidence presented by both sides as to Braun's wrongfully acquired past profits. By reinstating the jury's award of unjust enrichment damages, the Court of Appeals merely corrected the district court's legal error.

Third, even if Braun's arguments were legally correct, there would still be no circuit conflict. The Court of Appeals' opinion is an unpublished memorandum disposition. As such, it lacks precedential authority. Ninth Circuit Rule 36-3. Even if the opinion conflicted with the published decisions of every other circuit to consider the issue, as Braun wrongly contends, it would not create any circuit conflict because it is both unpublished and unciteable.

Finally, Braun's entire argument is absurd on its face. According to Braun's reasoning, an appellate court would never be able to reinstate a jury's award of damages, even when the district court has committed a blatant error of law in taking away a whole category of damages pursuant to a Rule 50(b) motion for judgment as a matter of law. Instead, the plaintiff would always be forced to choose between the district court's legally erroneous reduction and a new trial. The Seventh Amendment right to jury trial cannot possibly mean that a district court's legally erroneous reduction of a jury's damages award is immune from correction by an appellate court.

Braun's petition should be denied because there is neither a circuit conflict nor an important issue of law involved, and Braun's arguments on the merits do not warrant serious consideration.

STATEMENT OF FACTS

Braun's petition misstates the facts and improperly portrays the trial record in a light most favorable to itself. Properly stated in the light most favorable to the verdict, the true facts are as follows.

In 1989-1990, respondent Bobby Rogers invented a new medical valve. Ninth Cir. Supplemental Excerpts of Record ("SER") at 29-42. He and his friend Rob Zimmer (collectively "R&Z") formed a company and licensed the valve to B. Braun Medical Inc. ("Braun") in 1992. SER 36-37, 55; ER 182-94. The License Agreement provided that each party could use confidential information obtained from the other only in furtherance of their joint development of the valve. ER 186 at ¶ 9.

Braun did nothing to develop the valve. SER 437-38, 505-06. After a year of waiting in vain for Braun to act, R&Z took the initiative by commissioning ViR Engineering ("ViR") to do further development of the valve. SER 62-68, 292, 300.

ViR's engineers came up with unique designs for five different valve configurations. SER 78-92, 293-95, 314. The designs were all original engineering drawings never seen before in the prior art. ER 341-42, 472, 620, 630. These "Phase I" designs belonged solely to R&Z. SER 69-70, 94, 99.

R&Z presented these trade secrets to Braun in confidence, with the understanding that Braun would have a right of first refusal on any new valve under the terms of the License Agreement. SER 78, 102-106B, 219-21, 295-98. Braun agreed to fund further development of the ViR designs. SER 166-67, 309-12, 343; ER 233.

After another year of development, Braun secretly obtained an assignment of all rights to the new valve from the ViR engineers and applied for a patent on the valve in 1994. SER 151, 181-88, 318-23. Braun deliberately concealed the assignment of rights and the patent application from R&Z. SER 127-28, 145.

In 1995, Braun falsely informed Rogers by letter that it was abandoning the project and pursuing a different valve. ER 278-79; SER 135-38, 449-53. Handwritten notes of high-level internal meetings at Braun to discuss the drafting of the letter include the following notations: "do not pay add'l penny in royalty" and "No punitive award to receive in litigation other than what he may receive under contract" and "What to lose on litigation? Will only still pay royalty anyway." SER 384-88, 406, 426-27.

Braun eventually marketed the valve as the "Ultrasite" without paying royalties to R&Z. SER 453A, 454, 470. Braun's Ultrasite valve was derived directly from the trade secrets (the ViR designs) presented to it in confidence by R&Z pursuant to the License Agreement. SER 250-71, 314, 320-21, 327-41, 370-75, 522-23, 625-29.

Plaintiffs' damages expert calculated that Braun's past profits on the Ultrasite were $22.9 million up until the time of trial. SER 478-79, 481. Braun presented evidence that its past profits on the Ultrasite were approximately $12 million (excluding interest), SER 655-56, and that its past profits on all Ultrasite products were $16.6 million. ER 694.

STATEMENT OF THE CASE

The case was tried before a jury on causes of action against Braun for fraud and trade secret misappropriation under the California Uniform Trade Secret Act ("CUTSA"). The CUTSA expressly authorizes recovery of damages for both "the actual loss caused by the misappropriation" and "the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss." Cal. Civ. Code § 3426.3(a).

The district court correctly instructed the jury it could award both "actual damages" and "unjust enrichment" as long as they were not duplicative of each other. SER 668. The court further instructed that any award of damages had to reflect the extent of the misappropriated trade secret's contribution to Braun's profits. SER 668-69.

The jury found that Braun had willfully and maliciously misappropriated R&Z's trade secrets and committed intentional fraud. On the trade secrets claim, the jury awarded $16 million in past damages and $2.5 million in future damages. On the fraud claim, the jury awarded $1 million in compensatory damages and $1.25 million in punitive damages. SER 679-82.

The district court subsequently awarded $5 million more in exemplary damages pursuant to its authority under the CUTSA. Cal. Civ. Code § 3426.3(c). The district court specifically found that Braun had engaged in a willful effort to conceal the assignment and patent application. SER 684-86. After a separate bench trial, the district court also found R&Z to be the legal and equitable owners of the valve and reassigned the patent to them in lieu of the jury's award of future damages. ER 801-07, 824-27, 914, SER 756-58, 759-60.

In a post-judgment order, the district court granted Braun's motion for judgment as a matter of law ("JMOL") as to $11 million of the jury's $16 million award for past damages on the trade secret claim. Cert. App. at 33a, 45a. The district court noted: "Judgment as a matter of law is available to issues of damages and liability." Cert. App. at 26a. The court further discussed its authority to reduce the jury's damages award as follows:

> If the request was brought pursuant to a motion for new trial the Court may grant the defendant's motion for a new trial, or deny the motion, conditioned upon the prevailing party's acceptance of a remittitur. *See Hetzel v. Prince William County, Va.*, 523 U.S. 208, 211 (1998). ***If the request was brought pursuant to a motion for judgment as a matter of law, the Court may remit the***

> ***damages without giving the prevailing party the option of a new trial.*** *See Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1350-51 (Fed. Cir. 2001); *Johansen v. Combustion Eng'g*, 170 F.3d 1320, 1330-31 (11th Cir. 1999); *Central Office Telephone, Inc. v. American Telephone & Telegraph Co.*, 108 F.3d 981, 993 (9th Cir. 1997). A trial court granting a motion for remittitur does not substitute its judgment for that of the jury, but instead reduces the judgment to the maximum amount sustainable by the proof. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982) (citations omitted).

Cert. App. at 27a-28a (emphasis added).

The district court ultimately reduced the damages in connection with Braun's Rule 50(b) motion for JMOL, and it denied Braun's motion for new trial. The court found as a matter of law that R&Z were not entitled to any award of damages for Braun's unjust enrichment, and it limited the damages to R&Z's actual loss. Cert. App. at 32a. The court ruled: "[C]onsidering the totality of the evidence and the permissible inferences the jury could have made from it, the Court finds the maximum amount sustainable as *actual* loss is $5,000,000 for lost royalties and lost professional opportunities. Thus, as a matter of law, any actual loss award over $5,000,000 was not supported by sufficient evidence to sustain it. Therefore, the Court ***grants Braun's motion for judgment as a matter of law*** for compensatory damages in excess of $5,000,000 and remits $11,000,000 on this count. ***Braun's motion for new trial is denied.***" Cert. App. at 33a (emphasis added); *see also* Cert. App. at 45a (denying Braun's motion for new trial, granting in part Braun's motion for JMOL, and awarding R&Z only $5 million in past damages instead of the jury's award of $16 million).

Braun appealed and R&Z filed a cross-appeal. In its appeal, Braun did not contest any of the instructions given to the jury, including the instructions on damages and unjust enrichment under the CUTSA. Nor did Braun raise any Seventh Amendment issue relating to the trial court's failure to offer a new trial in lieu of the reduced damages.

In an unpublished memorandum disposition, the Court of Appeals affirmed the liability findings against Braun, but reversed the $1 million fraud damages award, vacated the patent reassignment, and reinstated the jury's $2.5 million award of future damages on the trade secret claim. Cert. App. at 17a.

In the cross-appeal, the Court of Appeals reinstated the jury's full award of $16 million in past compensatory damages on the trade secret claim. Cert. App. at 17a. The court found: "The district court erred in reducing the jury's compensatory damage award." Cert. App. at 8a. The Court of Appeals reasoned that the CUTSA expressly authorizes recovery of both actual damages and unjust enrichment as long as there is no double counting. Cert. App. at 8a-9a. The Court of Appeals stated: "Therefore, to the extent that the district court's decision was based on its own view that Rozi was not entitled to damages for unjust enrichment, the district court erred as a matter of law." Cert. App. at 9a.

As an alternative basis for its decision, the Court of Appeals found that the district court had violated the Seventh Amendment "to the extent" it substituted its own judgment for the jury's without offering plaintiffs the option of a new trial. Cert. App. at 9a-10a. The court concluded: "In sum, to the extent that the district court founded its decision on a belief that the damages were

precluded as a matter of law, it erred. To the extent that the district court substituted its own judgment as to the damages that should have been awarded, it violated the Seventh Amendment. The jury award for compensatory damages must be reinstated." Cert. App. at 10a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT CONFLICT: REINSTATEMENT OF THE JURY'S VERDICT IS THE PROPER APPELLATE REMEDY WHEN THE DISTRICT COURT HAS COMMITTED A LEGAL ERROR IN REDUCING THE DAMAGES PURSUANT TO A RULE 50(b) MOTION FOR JUDGMENT AS A MATTER OF LAW

Braun's petition persistently ignores the fact that the district court reduced the damages pursuant to a Rule 50(b) motion for JMOL. Cert. App. at 27a-28a, 32a-33a, 45a. Braun has deliberately avoided any mention of this fact so as to manufacture the appearance of a circuit conflict.

There is no circuit conflict on the real issue presented here. Where a district court has committed legal error in taking away a whole category of damages *pursuant to a Rule 50(b) motion for JMOL*, the circuit courts have uniformly decided that the proper appellate remedy is to correct the error by reinstating the jury's award. *See Hall v. Consolidated Freightways Corp. of Delaware*, 337 F.3d 669, 671, 680 (6th Cir. 2003); *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 569-570, 573 (7th Cir. 2003); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1178, 1204 (9th Cir. 2002); *Blackmon v. Pinkerton Sec. & Investigative*

Services, 182 F.3d 629, 630, 637 (8th Cir. 1999); *Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers*, 34 F.3d 1148, 1158, 1161 (2d Cir. 1994).

The holding of *McRoberts* is especially on point. In *McRoberts*, a jury awarded approximately $2.5 million for copyright infringement, breach of contract, and trade secret misappropriation. The district court partially granted the defendant's motion for JMOL as to $300,000 of the jury's award for trade secret misappropriation, ruling that this award was duplicative of the other damages. *McRoberts*, 329 F.3d at 563. The defendant appealed the judgment and the plaintiff cross-appealed. The Seventh Circuit rejected the claims asserted in the defendant's appeal, but in the cross-appeal, it found that the district court had erred by vacating the $300,000 award for trade secret misappropriation. *Id.* at 569-70. Accordingly, it "REINSTATED" the jury's full award. *Id.* at 573.

There is no Seventh Amendment obstacle to such a result. When a district court has committed an error of law by taking away a whole category of damages properly awarded by the jury, the right to jury trial cannot possibly prevent an appellate court from correcting the error by reinstating the jury's verdict. If anything, the Seventh Amendment right to jury trial requires that courts "must validate the jury verdict if at all possible." *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374 n.2 (5th Cir. 1981).

In fact, Braun's petition simply ignores the cases cited by the district court, which hold that the Seventh Amendment is not even implicated when a court reduces the

damages as a matter of law pursuant to Rule 50(b).[1] Cert. App. at 27a-28a (citing *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1350-51 (Fed. Cir. 2001); *Johansen v. Combustion Eng'g*, 170 F.3d 1320, 1330-31 (11th Cir. 1999); *Central Office Telephone, Inc. v. American Telephone & Telegraph Co.*, 108 F.3d 981, 993 (9th Cir. 1997)).

In *Tronzo*, plaintiff claimed that the defendant had taken his ideas for a medical device and incorporated them into its own competing device. He prevailed on patent infringement and other claims at trial, and the jury returned a multi-million dollar verdict. On appeal, the Federal Circuit concluded that the defendant's profits were an incorrect measure of compensatory damages under controlling state law. On remand, the district court therefore reduced the jury's compensatory damages award to $520 in patent prosecution costs. In a second appeal, the plaintiff argued that this reduction of the jury's award was a remittitur, and claimed that the district court had violated his Seventh Amendment rights under *Hetzel v. Prince William County*, 523 U.S. 208 (1998) by failing to give him the option of a new trial.

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[1] To the extent Braun is now attempting to raise a Seventh Amendment issue in its petition, it cannot do so for two reasons. First, it is the *plaintiff* who has a Seventh Amendment right to be given the option of a new trial in a classic remittitur situation. *Hetzel v. Prince William County, Virginia*, 523 U.S. 208 (1998). As the *defendant*, Braun lacks standing to claim that the *plaintiffs* should have been offered the option of a new trial. *Thorne v. Welk Investment, Inc.*, 197 F.3d 1205, 1210 (9th Cir. 1999) ("Nonconsensual remittitur implicates the Plaintiff's Seventh Amendment jury right, not the Defendants' who lack standing to raise the issue"). Second, even if Braun had standing to assert plaintiffs' Seventh Amendment rights, Braun has waived the issue by failing to raise it in its own appeal to the Ninth Circuit.

The Federal Circuit rejected this argument. It held that *Hetzel* does not apply to "the reduction in a damages award on purely legal grounds." *Tronzo*, 236 F.3d at 1351. The court concluded that *Hetzel* is limited to "a classic remittitur situation" involving "a reweighing of the evidence and reassessment of the appropriate amount of damages warranted by the facts – decisions traditionally left to a jury." *Ibid.* In *Tronzo*, the district court had not reweighed the evidence or exercised its discretion in computing the reduced damages award. Instead, the district court had merely "awarded the maximum damages possible given the lack of competent evidence in the record." *Ibid.* Thus, the Federal Circuit found no Seventh Amendment violation. *Ibid.*

Tronzo relied primarily on the Eleventh Circuit's earlier decision in *Johansen*. In *Johansen*, the court held that a judge may reduce a punitive damages award to the constitutionally permissible maximum without giving the plaintiff the option of a new trial. The court held: "[T]he power to do so is located in the court's authority to enter judgment as a matter of law. Thus, a court proceeds under Rule 50, not Rule 59, in the entry of judgment for a constitutionally reduced award and ***the Seventh Amendment is not implicated in this legal exercise.***" *Johansen*, 170 F.3d at 1331 (emphasis added).

Similarly, in *Central Office Telephone*, the Ninth Circuit affirmed a magistrate's post-trial order reducing a jury verdict of $13 million compensatory damages to approximately $1.2 million. The court held that the Seventh Amendment did not require giving the plaintiff the option of a new trial:

> [T]he magistrate judge did not reduce the award upon AT&T's motion for a new trial, but rather upon their motion for judgment as a matter of law. Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment. The magistrate judge's action under Rule 50 does not appear to be in conflict with the Seventh Amendment.

Central Office Telephone, 108 F.3d at 993 (citations omitted).

These decisions are consistent with the principle that determining the "upper limit" of damages sustainable on the evidence is not a question of fact, but a question of law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996). By reducing damages to the maximum amount legally permissible under the evidence, a court decides a question of law and thus does not intrude on the jury's function as fact-finder. Resolving such a legal question pursuant to a Rule 50 motion for JMOL is "compatible with the Seventh Amendment." *Id.* at 436 n.20; *see also Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 321 (1967) ("it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial"); Fed. R. Civ. P. 50(a), Advisory Committee's Note, 1991 Amendment ("action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law").

In other contexts where a jury has awarded damages that are not recoverable as a matter of law, this Court has not hesitated to reduce the jury's award without offering

the option of a new trial. *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591, 622 (1893) (reducing judgment to eliminate prejudgment interest awarded by jury); *Insurance Company v. Piaggio*, 83 U.S. (16 Wall.) 378, 390 (1872) (reducing judgment "by disallowing the sum of $5000 damages found by the jury" and remanding with directions to enter judgment for reduced amount).

Other federal courts have also concluded that the Seventh Amendment does not prohibit a reduction of damages to the upper limit permissible as a matter of law, without offering plaintiffs the option of a new trial. *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002); *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002); *Ryan v. Fortune Transportation Co.*, 291 F. Supp. 2d 933 (S.D. Iowa 2003); *see also C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d 592, 603 (8th Cir. 1996) ("When it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there, district courts possess the power to reduce the amount of the verdict accordingly").

The line of allegedly conflicting circuit cases cited by Braun simply did not involve a reduction of damages made in connection with a Rule 50(b) motion for JMOL. *See Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220 (10th Cir. 2004); *Thorne v. Welk Investment, Inc.*, 197 F.3d 1205, 1211-12 (9th Cir. 1999); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 914-15 (2d Cir. 1997); *Burnett v. Coleman Co.*, 507 F.2d 726, 727 (6th Cir. 1974); *Stewart v. Atlantic Pipe Line Co.*, 479 F.2d 311, 312 (5th Cir. 1973).

Simply put, there is no circuit conflict on this issue. A district court acting pursuant to Rule 50(b) may reduce a jury's damages award to the maximum amount sustainable by the evidence *as a matter of law* without offering

the plaintiff the option of a new trial. *Johansen*, 170 F.3d at 1331; *Central Office Telephone*, 108 F.3d at 993. When the district court commits a legal error in doing so, the appellate court may correct the error by reinstating the jury's verdict. *McRoberts*, 329 F.3d at 569-70, 573. That is all the Court of Appeals has done.

II. THE NINTH CIRCUIT'S DISPOSITION DOES NOT REQUIRE REINSTATEMENT OF AN EXCESSIVE DAMAGES AWARD

The whole premise of Braun's petition is the false notion that the Ninth Circuit's disposition requires reinstatement of an excessive damages award. In support of this assertion, Braun repeatedly cites the *district court's* finding that the jury's award for unjust enrichment was not recoverable. Cert. App. at 32a. What Braun conveniently ignores, however, is that the Ninth Circuit found the district court's ruling to be wrong "as a matter of law." Cert. App. at 9a. The Ninth Circuit's disposition manifestly does not require reinstatement of an excessive award – it merely corrects the district court's legal error in reducing the award.

The jury's award of $16 million for unjust enrichment was fully supported by the evidence presented at trial. R&Z presented expert testimony that Braun's past profits on the Ultrasite were $22.9 million. SER 478-79, 481. Braun presented expert testimony that its past profits on the Ultrasite were approximately $12 million, SER 655-56, and also that its past profits on all Ultrasite products were $16.6 million. ER 694. The jury's award of $16 million was squarely within the range of the evidence presented.

Even the district court acknowledged that the $16 million award for Braun's unjust enrichment was amply

supported by the evidence. The court stated: "[I]f I find that unjust enrichment is the maxim . . . that anyone who does wrong should not profit by that wrong, if that's the maxim that applies to this case, I don't find the damage numbers of $16,000,000 out of line at all." SER 698. The court elaborated: "[I]f it's true that unjust enrichment as a matter of law is any profit made from wrongful conduct, . . . then it seems to me the verdict on the compensatory damages portion is supported by substantial evidence." SER 699. However, the district court ultimately committed a legal error by ignoring crystal clear California law allowing for unjust enrichment damages.[2]

The Ninth Circuit correctly ruled that there was nothing wrong with the jury's award of unjust enrichment damages based on the evidence of wrongful profits Braun realized from its willful misappropriation of R&Z's trade secrets. Cert. App. at 8a-9a. Indeed, Braun itself does not dispute that damages for unjust enrichment *are* available as a remedy under the CUTSA. The Ninth Circuit found that the district court "erred as a matter of law" to the extent it ruled that R&Z were "not entitled to damages for unjust enrichment. . . ." Cert. App. at 9a. This *was* the basis for the district court's ruling. By reinstating the

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[2] Braun relies on the district court's finding that R&Z "presented no methodology for the jury to distinguish unjust enrichment from general enrichment." Cert. App. at 32a. However, Braun cites no authority to support the claim that R&Z had an obligation to supply some kind of magical formula for calculating unjust enrichment. The jury was instructed that any award of damages had to reflect the extent to which the misappropriated trade secrets contributed to Braun's profits. SER 668-69. This *was* the correct "methodology" for calculating unjust enrichment. *See, e.g., C&F Packing Co., Inc. v. IPB, Inc.* 224 F.3d 1296, 1303-05 (Fed. Cir. 2000). Notably, Braun did not even contest the unjust enrichment instructions on appeal.

jury's original award, the Ninth Circuit merely corrected the district court's legal error.

Nor did the Ninth Circuit intrude on the district court's discretion in doing so, as Braun claims. Once again, Braun overlooks the fact that the district court reduced the damages in connection with Braun's own motion for JMOL pursuant to Rule 50(b). Cert. App. at 33a, 45a. Unlike a traditional remittitur or motion for new trial, a court deciding a Rule 50(b) motion must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the verdict. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000). Judgment as a matter of law may be granted only when "there is no legally sufficient evidentiary basis" for the jury's verdict. Fed. R. Civ. P. 50(a)(1). In ruling on such a motion, the district court "has no discretion whatever and considers only the question of law whether there is sufficient evidence to raise a jury issue." *Jones v. Associated Universities, Inc.*, 870 F. Supp. 1180, 1193 n.23 (E.D.N.Y. 1994).

An order granting JMOL is a legal decision subject to *de novo* review. *Thoseteson v. United States*, 331 F.3d 1294, 1298 (11th Cir. 2003). Specifically, the *de novo* standard of review applies to an order granting JMOL as to the amount of damages for trade secret misappropriation. *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 569 (7th Cir. 2003); *see also Denius v. Dunlap*, 330 F.3d 919, 929 (7th Cir. 2003) (order "granting the defendants' motion for JMOL on the issue of emotional damages" is subject to *de novo* review); *National R.R. Passenger Corp. v. Rountree Transport and Rigging, Inc.*, 286 F.3d 1233, 1244 (11th Cir. 2002) (order granting JMOL "on the amount of damages" is subject to *de novo* review); *Snapp v.*

Unlimited Concepts, Inc., 208 F.3d 928, 932-33 (11th Cir. 2000) (order granting JMOL on punitive damages is subject to *de novo* review).

In accordance with these authorities, the Court of Appeals reviewed the district court's order and found that it had "erred as a matter of law" in depriving R&Z of their statutory right to recover damages for Braun's unjust enrichment. Cert. App. at 9a. The Court of Appeals did not intrude on the district court's discretion, nor did it compel the reinstatement of an excessive damages award; it merely corrected the district court's legal error and reinstated an award that was erroneously reduced in the first place.

III. THERE IS NO CIRCUIT CONFLICT: BRAUN'S PETITION ITSELF CONCEDES THAT ALL OF THE RELEVANT *PUBLISHED* CASES ARE CONSISTENT WITH EACH OTHER

The primary basis for Braun's petition is its claim that the Ninth Circuit's opinion has allegedly created a conflict with every other circuit to consider this issue. However, even if Braun were right on the law, there still would not be any circuit conflict. The Ninth Circuit's opinion is an unpublished memorandum disposition that lacks precedential value and may not be cited. Ninth Circuit Rule 36-3. Braun itself requested publication of the opinion, but the Ninth Circuit denied its request on February 6, 2006. According to Braun's own petition, all of the other *published* circuit court opinions on this issue are *consistent* with each other. Because Braun acknowledges that there is no conflict between the *published* decisions, there is no circuit conflict that would warrant a grant of certiorari.

CONCLUSION

Braun has not established any persuasive reason for this Court to grant certiorari. There is no circuit conflict and no important issue of law involved. Braun's arguments on the merits are unworthy of consideration by this Court.

Respectfully submitted,

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